

VINCENT A. PEPPER  
ROBERT F. CORAZZINI  
PETER GUTMANN  
JOHN F. GARZIGLIA  
NEAL J. FRIEDMAN  
ELLEN S. MANDELL  
HOWARD J. BARR  
MICHAEL J. LEHMKUHL \*  
SUZANNE C. SPINK \*  
MICHAEL H. SHACTER  
KEVIN L. SIEBERT \*  
PATRICIA M. CHUH

\* NOT ADMITTED IN D.C.

PEPPER & CORAZZINI  
L. L. P.

ATTORNEYS AT LAW

1776 K STREET, NORTHWEST, SUITE 200

WASHINGTON, D. C. 20006

(202) 296-0600

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GREGG P. SKALL  
DORE MALLYCK  
OF COUNSEL  
FREDERICK W. FORD  
1909-1986

TELECOPIER (202) 296-5572  
INTERNET PEPCOR@COMMLAW.COM  
WEB SITE HTTP://WWW.COMMLAW.COM

October 30, 1997

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OCT 30 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
Washington, D.C. 20554

Re: In re Preemption of State and Local Zoning and  
Land Use Restrictions on the Siting,  
Placement and Construction of Broadcast  
Station Transmission Facilities  
(MM Docket No. 97-182)

Dear Mr. Caton:

Transmitted herewith on behalf of New Jersey Broadcasters  
Association is an original and four copies of its Comments in the  
above-referenced rule making proceeding.

Should any questions arise concerning this matter, please  
contact this office directly.

Sincerely,



John F. Garziglia  
Patricia M. Chuh

Enclosure

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OCT 30 1997

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Preemption of State and Local Zoning and ) MM Docket No. 97-182  
Land Use Restrictions on the Siting, )  
Placement and Construction of Broadcast )  
Station Transmission Facilities )  
  
To: The Commission

**COMMENTS OF NEW JERSEY BROADCASTERS ASSOCIATION**

New Jersey Broadcasters Association ("NJBA"), by its attorneys, hereby submits its comments in response to the Commission's Notice of Proposed Rule Making, MM Docket No. 97-182, released August 19, 1997 ("NPRM").<sup>1/</sup> In summary form, here is NJBA's position in this proceeding which favors the preemption of certain local state zoning and land use laws and practices:

Assuming compliance with all applicable FCC and Federal Aviation Administration ("FAA") rules and policies, if a new or modified tower is sited, or is to be sited, on land that is already zoned for industrial or commercial uses, or unzoned, then any local/state zoning or land use restriction that is not in the furtherance of a specific and demonstrable significant safety objective should be preempted. In the case of an existing tower sited on land that is now zoned for residential use, but the tower was built before the adoption of residential zoning or was built with a special exception, then any local/state zoning or land use restrictions that affect the modification or replacement of that preexisting tower should also be preempted, unless the proposed modification or replacement would substantially impair a specific and demonstrable significant safety objective.

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<sup>1/</sup> The NPRM established October 30, 1997 as the deadline for filing comments. Id. The instant comments of NJBA are therefore timely filed.

## Background

1. As a non-profit association representing the interests of New Jersey radio and television stations, NJBA is painfully aware of the adversities faced by its members in siting, constructing, and modifying broadcast transmission facilities. The Commission released the NPRM in response to a Petition for Further Notice of Proposed Rule Making ("Petition") jointly filed by the National Association of Broadcasters and the Association for Maximum Service Television ("Petitioners").<sup>2/</sup> Because the Commission wishes to insure the rapid implementation of DTV and desires to promote the vast potential of radio and television, it seeks comment on a variety of zoning and land use issues.

2. Specifically, the Commission requests comment on whether certain local/state zoning and land use laws and practices will be an obstacle to the rapid implementation of DTV and whether such laws and practices will needlessly impede the re-siting of antennas, made necessary by the implementation of DTV. The Commission also seeks to determine whether such local/state zoning and land use laws and practices unduly delays and/or prohibits federally authorized broadcasters from establishing and improving radio and television broadcast service. Whether such

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<sup>2/</sup> Although the Petition was filed in the Commission's Digital Television proceeding, Fifth Report and Order, MM Docket No. 87-268, FCC 97-116 (April 22, 1997), 62 F.R. 26996 (May 16, 1997), the Commission treated the Petition as if it was filed pursuant to Section 1.401 of the Commission rules.

difficulties experienced by broadcasters are representative of the broadcast industry in general is of particular interest to the Commission. The Commission also desires information on the actual experiences of broadcasters with local/state zoning and land use laws and practices and the duration of the various approval processes associated with such local/state laws and practices.

#### **Comment**

3. Although NJBA recognizes the importance of local and state interests in the health and safety of their citizenry, certain local/state zoning and land use laws and practices are unreasonable, obstructionist, and/or duplicative of existing federal laws and policies. As a consequence, federally authorized broadcasters are unable to improve upon existing services and incapable of fulfilling the vast potentialities of radio and television, as directed by Congress. Because local citizens are often emotionally charged and unreasonable when it comes to broadcast transmission facilities, it is virtually impossible for broadcasters to obtain approval to site, construct, and/or modify broadcast transmission facilities, regardless of the time, money, and effort expended by broadcasters to address local/state concerns. It is common practice for local/state authorities to defeat broadcasters' requests for no other reason than the illogical attitude of "not in my back yard." As such, the Commission should preempt all local/state zoning and land use laws and

practices that do not further a specific and demonstrable significant safety objective.

4. The Commission should adopt preemption rules using a presumptive standard, similar to that codified in Section 25.104(b) of the Commission's rules. Section 25.104(b) of the Commission's rules presumes that all local/state zoning, land-use, building, or similar regulations concerning the installation, maintenance, or use of a satellite earth station antenna that is two meters or less in diameter is unreasonable, where the earth station is to be located in an area that generally permits commercial or industrial uses. The rule, therefore, preempts all such restrictions. See 47 C.F.R. Sec. 25.104(b)(1); In re Preemption of Local Zoning Regulations of Satellite Earth Stations, Report and Order, Memorandum Opinion & Order and Further Notice of Proposed Rule Making, 11 FCC Rcd 19276 (1996). The presumption may be rebutted by a showing by the local/state authorities that the regulation in question is "necessary to accomplish a clearly defined health or safety objective that is stated in the text of the regulation itself." 47 C.F.R. Sec. 25.104(b)(2)(1).

5. NJBA urges the Commission to adopt rules preempting similar local/state local zoning and land use restrictions on the siting, construction, and modification of broadcast transmission facilities. For example, if a new or modified tower is sited, or is to be sited, on land that is already zoned for industrial or commercial uses, or unzoned, then any local/state zoning or land use restriction that is not in the furtherance of a specific and

demonstrable significant safety objective should be preempted, assuming that the tower complies with all applicable FCC and FAA rules and policies. The adoption of such rules will allow New Jersey broadcasters, such as Group M Communications, Inc. ("Group M"), a previous licensee of WNNJ(FM), Newton, New Jersey ("WNNJ"), to improve broadcast service. See Attached Declaration of Marvin Strauzer. After two previous unsuccessful endeavors, Group M proposed to build a tower in Stillwater Township, New Jersey. Located in a rural, wooded area, the property (at the time of purchase) was zoned specifically for communications uses and the zoning ordinance did not contain any limitations on tower height. The town fathers, however, rewrote the applicable zoning ordinance and placed a height restriction of 75 feet due to immense pressure from citizens groups. The new ordinance specifically prohibited radio uses. As a result, Group M was unable to build its tower. To prevent such local abuses, the Commission should preempt local/state zoning and land use laws that restrict the siting or modification of broadcast transmission facilities that are sited, or are to be sited, on land that is already zoned for industrial or commercial uses, or unzoned, assuming that the facility complies with all applicable FCC and FAA rules and policies.

6. The Commission should preempt any local/state zoning or land use restrictions that affect the modification or replacement of preexisting towers, if the existing tower is sited on land that is now zoned for residential use, but the tower was built

before the adoption of residential zoning or was built with a special exception, unless the proposed modification or replacement would substantially impair a specific and demonstrable significant safety objective.


7. In another example occurring in New Jersey, Pillar of Fire, the licensee of WAWZ(FM), Zarephath, New Jersey ("WAWZ"), has been prohibited from modifying or replacing its existing towers. See Attached Declaration of Reverend S. Rea Crawford; see also Attached Newspaper Articles: Joe Tyrrell, Bridgewater Hears New Radio Tower Bid, The Star-Ledger, Aug. 6, 1997, and David Behrend, WAWZ Says Tower Will Boost Audience, The Courier-News, Oct. 15, 1997. In the case involving WAWZ, Pillar of Fire sought and continues to seek local approval to replace its existing tower, which is located on property zoned for residential use. Pillar of Fire must battle the local zoning authorities even though residential homes were not built in the area for 20 years following the original siting of the WAWZ tower. (Pillar of Fire originally built the tower by obtaining a use variance.) Thus far, Pillar of Fire's efforts to replace its tower and to respond to local concerns has taken over ten years and cost over \$500,000. A broadcaster, such as Pillar of Fire, should not have to endure such long delays or expend such exorbitant amounts of funds when it only seeks to replace an existing tower. The fact that the tower is located on land zoned for residential use is irrelevant where the siting of the tower preceded the entry of homes in the area by 20 years.

8. Further, where a broadcast facility has been determined to be in compliance with Commission regulations and policies, the Commission should categorically preempt all duplicative local/state laws based on the environmental or health effects of RF radiation. Similarly, the Commission should also preempt all local/state laws regulating tower marking, painting, and/or lighting to the extent that a broadcast facility has been deemed to be in compliance with all FCC and FAA Administration regulations or policies. Local/state laws concerning these areas are duplicative of federal law and only serve to delay and obstruct the siting, constructing, and/or modification of broadcast transmission facilities.

WHEREFORE, for the foregoing reasons, NJBA urges the Commission to preempt certain local state zoning and land use laws and practices.

Respectfully Submitted,

**NEW JERSEY BROADCASTERS ASSOCIATION**

  
By: John F. Garziglia  
Patricia M. Chuh  
Its Attorneys

PEPPER & CORAZZINI, L.L.P.  
1776 K Street, N.W., Suite 200  
Washington, D.C. 20006  
(202) 296-0600

October 30, 1997



# **DECLARATION OF MARVIN STRAUZER**

I, Marvin Strauzer, along with Michael Levine, are the principals of Group M Communications, Inc. ("Group M"), the previous licensee of WNNJ(AM)/(FM), Newton, New Jersey. In that capacity, I experienced the unreasonableness of the local citizenry and the difficulties of obtaining local approval to modify or to locate a new broadcast tower.

On or about 1983, Group M sought to increase power from 5,000 watts to 25,000 watts and to increase the WNNJ(FM) tower height from 140 feet to 500 feet above average terrain. Group M entered into a contingent contract for a 50 acre property in Fredon Township on which to locate the tower. The property was zoned for residential use. As such, Group M sought a use variance. Group M was defeated by the Fredon Township Board of Adjustment due to immense pressure from various citizens groups. The use of an alternate piece of property zoned for light industrial use in the same town (and owned by a member of the Fredon Township Board of Adjustment) was also defeated, needing only a simple majority vote for a positive interpretation of existing zoning.

As a result, Group M purchased property (21 acres) in neighboring Stillwater Township during 1986, for which a construction permit was granted. The property is located in a rural, wooded area, on top of a hill, approximately 1,000 feet

above sea level. At the time that Group M purchased this property, permitted uses included a variety of communications uses and my recollection is that the zoning ordinance did not contain limitations on tower height. Regardless, Group M's plans to build a 299 foot tower was defeated again due to bad press and enormous pressure from citizens groups, including Stillwater Citizens Against Tower (SCAT). See e.g., Letter from the Stillwater Township Board of Education to Group M Communications, dated July 22, 1986. Group M was prohibited from locating its tower at this site even though it was willing to commit to constructing a noncommercial station to be operated by Sussex County Community College and Sussex Tech school including free tower space and providing rent-free usage of the proposed tower to the local rescue squad. Group M also promised that approximately one acre of the 21 acres would be used for the tower and that the rest of the 20 acres would remain wooded and rural, which would coincide with residents wishes. Nevertheless, the town fathers rewrote the zoning ordinance placing a height cap of 75 feet and specifically omitted radio as a permitted use, while other communications facilities including cable television were listed as acceptable.

There is only a small area in which WNNJ(FM) may transmit its signal and comply with the Commission's rules because WNNJ(FM) is located in a very congested area with numerous other co-channel and adjacent channels. Hampered by this limitation

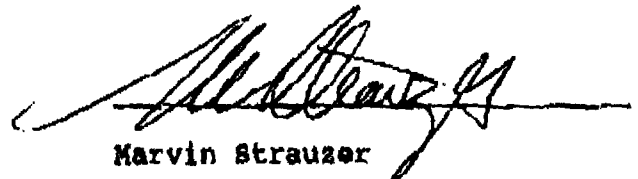
and due to the refusal of the Fredon Township and Stillwater Township Boards of Adjustments to permit the location of a tower in their town, Group M had no choice but to rent space on an existing tower in Frankford Township. As a result, WNNJ(FM) had to downgrade from Class B to Class B1 and had to pay \$1,600 per month for tower rental, contrary to its plans.

Based upon my experiences, I fully support the adoption of Commission rules that would prevent local and state entities from behaving in such an unreasonable manner.

I, Marvin Strauser, do hereby certify that the foregoing is true and correct to the best of my knowledge.

10/29/97

Date

  
Marvin Strauser

## Stillwater Township Board of Education

Telephone (201) 303-6171

July 22, 1986

P.O. Box 12  
Stillwater, N.J. 07075

Group M Communications  
Box 40  
Newton, N. J. 07860

Attention: Mr. Marvin J. Strauser  
Mr. Michael Levine

Gentlemen:

Your informal proposal to provide the wherewithal to establish an educational non-commercial radio station at the Stillwater Township School was presented and discussed at a regular Board of Education meeting held on July 14, 1986. While the Board appreciates your verbal offer, the Administrator and Board members felt that adding a course of study in broadcasting was not a priority item for a K-6 school at this time.

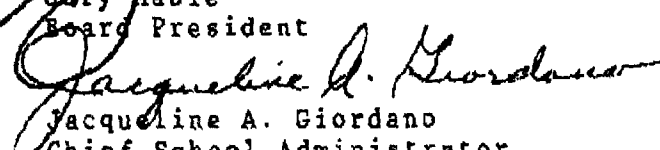
The Board also wishes you to know that while it does not have all the details of the proposed construction of a radio tower in Stillwater, it is concerned about the safety and health aspects that such a tower would have on the Township and its residents. With a copy of this letter it is communicating its concern to the Stillwater Township Zoning Board of Adjustment.

Sincerely,

STILLWATER TOWNSHIP BOARD OF EDUCATION



Gary Habie  
Board President



Jacqueline A. Giordano  
Chief School Administrator

d1

cc: Stillwater Township  
Zoning Board of Adjustment

**DECLARATION OF REVEREND S. REA CRAWFORD**

I, Reverend S. Rea Crawford, am a Trustee of Pillar of Fire, the licensee of WAWZ(FM), Zarephath, New Jersey ("WAWZ" or "Station").

In 1968, Pillar of Fire owned property on the Watchung Mountain range, which consisted of two and one-half acres. Although the property was zoned for residential use, homes were not built in the area for 20 years and Pillar of Fire was able to obtain a use variance to place a 226 feet broadcast tower on the property.

In approximately 1987, Pillar of Fire sought authority to replace the existing tower with a 376 feet tower (to be located within 100 feet of the original tower). Pillar of Fire also acquired additional acreage, bringing the total acreage of the Watchung Mountain site to 17 acres in Bridgewater and Bernards Townships. The local Board of Adjustments denied Pillar of Fire's requests due to concerns over property values, radiofrequency radiation, and aesthetic beauty even though the new tower would only replace an existing tower. In 1988, Pillar of Fire went before a higher court to appeal the decision and were denied.

In order to address these concerns, Pillar of Fire began again and sought authority from the Bridgewater Board of Adjustments to build a new 440 feet tower with co-location capabilities, in late 1995. This tower is to be located one

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hundred feet away from the present tower. In addition to providing co-location for FM broadcast, cellular, PCS, paging, and two-way radio, Pillar of Fire proposes to replace the old WAWZ tower, among other things. Addressing concerns over aesthetic beauty and property values, the proposed tower will replace two existing towers in the area with one tower. Additionally, it will serve the community by housing emergency communications systems (e.g., Bridgewater Police "911" emergency, Fire Departments, EMS services) at no charge to the communities. Pillar of Fire even paid approximately \$30,000 for a rendering of a visual impact study by the New School for Urban Studies to further respond to community concerns about property values and aesthetic beauty.

Thus far, Pillar of Fire's efforts to replace the WAWZ tower has taken over ten years and cost between \$150,000 to \$175,000 for the first round ending in the 1988 appeal and an additional \$307,000 (approximately) seeking approval for its present proposal. Although this matter is still pending (and as such a favorable outcome is still possible), I support the adoption of Commission rules that will expedite (or replace) the local processes by which broadcasters must obtain approval to replace or modify existing towers.

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SENT BY:

WAWZ/PILLAR OF F

10-22-97 10:30AM : Pepper & Corazzini-

908 271 1968:# 4/ 4

I, Reverend S. Rea Crawford, do hereby certify that the foregoing is true and correct to the best of my knowledge.

10/22/97

Date

S. Rea Crawford

Reverend S. Rea Crawford

WEDNESDAY, AUGUST 6, 1997

THE STAR-LEDGER

# Bridgewater hears new radio tower bid

By Joe Tyrrell

STAR-LEDGER STAFF

With changes in the communications business upping the ante, representatives of a religious broadcaster faced off with residents of Bridgewater and Bernards last night in another high-stakes battle over a proposed radio tower.

The players at a preliminary hearing before the Bridgewater Zoning Board were slightly different, though, as Somerset County is not a partner of the Pillar of Fire religious community's latest application.

But the county still intends to use antenna space on the proposed 440-foot tower, double the height of an existing one for Pillar of Fire's WAWZ-FM, according to testimony last night.

"Somerset County has some equipment at the Pillar of Fire site now, and they want to have more" for the county communications network, said Mary Hearn, the architect for the project.

In 1995, the freeholders secretly agreed to co-sponsor the tower, in the guise of a swap of neighboring county parkland for Pillar of Fire property. The sites are on the Second Watchung ridge, near the borders of Bridgewater, Bernards and Warren townships.

Residents sued after learning of the subterfuge, and Superior Court Judge Robert Guterl ruled against the county in January, saying the case was "all about money, it's not about public safety." At Guterl's urging, the county dropped its part in the application.

If the new tower goes through, another communications company, AAT Inc. of Edison, would close down operations on an adjacent tower and move them onto the taller one, said Pillar of Fire attorney Michael Inzelbuch.

Besides companies renting antenna space on the existing WAWZ tower, AAT would bring its clients, including Bell Atlantic, Metro One and Nextel, to the new Pillar of Fire tower, Hearn said.

A planned building on the site for transmitters and other equipment would have 6,770 square feet of space, compared with a combined 2,026 feet at existing WAWZ and AAT facilities, Hearn said.

Of the new building, "34 percent of the space is for future growth," she said, as new cellular and digital users vie with existing broadcast media for space. At 586 feet above sea level, the site near the ridge top is one of the highest in Somerset County.

The hearings, which are expected to last into next month, begin as AAT is seeking zoning approval for a similar enlargement of a tower in Hillsborough. Somerset County officials also back that project, and have said they will move their southerly communications equipment onto it from an existing tower in the township.

That came despite a statement by the freeholders last year, after residents learned of the Bridgewater tower and began fighting it. The freeholders criticized the opposition, saying a county 911 committee had approved both the current Hillsborough tower and the proposed Bridgewater one.



# WAWZ says tower will boost audience

10/15/97

*On front page of SOMERSET SECTION (ENLARGED 25%)*

By DAVID BEHREND  
Courier-News Staff Writer

BRIDGEWATER — A controversial 440-foot communications tower proposed by the Pillar of Fire church would extend the signal of its radio station to hundreds of thousands of homes and reach beyond Central Jersey.

The Bridgewater Board of Adjustment continued to hear testimony Tuesday from an engineer working for the church, which now broadcasts its WAWZ 99.1 FM radio signal from a 226-foot tower at the site.

The meeting marked the sixth round of hearings on the proposal.

The new tower would add more than 900,000 potential listeners to the station's coverage area, mostly in Monmouth County and the Trenton area, said Clarence Beveridge, an engineer working for Pillar of Fire. The Pentecostal church is based in the Zarephath section of Franklin. They reach a potential audience of 9.96 million people now.

Pillar of Fire attorney Michael Inzelbuch said the church needs to build the taller tower to meet Federal Communications Commission requirements. Those rules say a station must maximize its ability to reach listeners or face challenges

from rivals who will try to take its license.

But some board members said they would make their ruling independent of federal guidelines.

"Just because the FCC says something, I place no credence in that locally," board member Patrick Scaglione said. ←

The existing tower would be torn down if the application is approved. The new tower would be used by the church for its radio station and by the county for its 911 system.

The taller tower also would reduce areas hit by interference within the existing coverage area, Beveridge said.

That would allow more drivers on Interstates 287 and 78, along with Route 22, to receive the station clearly in their cars.

The church's quest for a taller tower has been plagued by controversy.

The Mount Horeb Road site was the focus last year of a controversial land swap between the church and the Somerset County Board of Freeholders.

A citizens' group — the Tri-Township Committee for a Beautiful Ridge — has been battling the tower for more than a year.

The station broadcasts Christian music, talk shows and other programming.

# Expert: Homes won't be affected

By DENISE VALENTI  
Courier-News Staff Writer

**BRIDGEWATER** — An appraisal expert testified Tuesday night that a 440-foot communication tower proposed off Mount Horch Road would have no negative impact on area property values.

Eugene Flaherty told the Zoning Board that communication towers in residential areas have an unmeasurable impact on property values, generally about 3 percent or less. Flaherty is also employed as an assessor in Somerville and North Plainfield.

Three witnesses testified Tuesday night on behalf of Pillar of Fire church, which wants to tear down its 226-foot tower and replace it with the taller tower.

The meeting was the third so far; two more are scheduled and more may still be needed.

About 30 people attended, including representatives of the Tri-Township Committee for a Beautiful Ridge, who have been fighting the project for several years.

Pillar has proposed using the tower for its radio station, WAWZ, and also to improve Somerset County's 911 system. Space on the tower could also be rented for a variety of smaller communications antennae.

Board Chairman Axel Velden said the church hasn't even gotten into the meat and potatoes of its testimony: why the tower has to be so high and why it is necessary.

"I don't know if we'll do it in six meetings," he said.

Tuesday's testimony revolved around the impact of the tower on nearby homes.

After hearing testimony that the tower would have a negligible impact, a board member asked what types of quality of life issues would impact a home's value.

□ See HOMES on Page B-3

THE COURIER-NEWS 8-27-97

## HOMES: Not affected

Continued from Page B-1

Flaherty said a busy street nearby might have that effect.

Flaherty's testimony was contradicted somewhat by the testimony of Robert Vance, a professional real estate appraiser, who said in some areas a large tower might impact property values negatively. But he also gave examples of home sale prices in areas with existing towers, demonstrating that they have risen over the years.

A third witness testified about the structural soundness of the tower, but admitted he was basing his testimony on the reputation of the company rather than an independent review of the plans.

Donald Neubauer, a Maryland engineer who has worked with communications towers for the past 20 years, testified that the proposed tower could hold up to 360 antennas and could withstand 85 mph winds at ground level.

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